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No. 06-1258

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RAYMOND ANTHONY MILLER,

Petitioner,

vs.

TERRY J. HARGET and
THE CITY OF RIVERDALE, GEORGIA,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION

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RULE

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OTHER AUTHORITY

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STATEMENT OF THE CASE

Petitioner misconstrues some of the underlying facts in an attempt to have his petition granted. For instance, Petitioner alleges that Officer Harget "drove his patrol car behind the vehicle he was driving and parked in a position to block the movement of Mr. Miller's car" (Pet. App. 3). What Petitioner fails to mention is that he had already parked his car and was preparing to exit. (Pet. App. 12a). Although the patrol car may have eventually blocked his car, at the time of the first encounter between Officer Harget and Petitioner, it did not. (Pet. App. 13a). Simply put, Officer Harget did not stop Petitioner's vehicle. Furthermore, Petitioner had no plan to immediately move his vehicle as he was preparing to walk to his hotel room.

Second, Petitioner alleges that Officer Harget had a video of this event but has refused to provide it. However, such allegation is mere speculation on Petitioner's part. There is no evidence that Officer Harget had an operational dash-mounted camera on September 30, 2001. Third, even if he did have the dash-mounted recording device, there is no evidence that it would have been activated by Officer Harget flashing only his side lights.

Fourth, Petitioner argues that Officer Harget did not administer a field sobriety test on Petitioner. This is true because Petitioner refused to participate in one. Petitioner admitted that Officer Harget stated, "I want you to take a breath test." Petitioner mistakenly calls this roadside test a breathalyzer.[1] It is not. As stated in Officer Harget's affidavit and deposition testimony, he requested Petitioner

[1] The Eleventh Circuit mistakenly called this a breathalyzer test as well.

perform an alcosensor test, which is a preliminary screening device that detects the presence of alcohol.[2] This is a field sobriety test. The "breathalyzer" is the state administered test performed on the "Intoxilyzer 5000". This test is performed after arrest to detect the suspect's blood alcohol content.[3]

Petitioner was not detained or seized until after Officer Harget smelled an alcoholic beverage emitting from the passenger compartment of the vehicle.[4] Although Petitioner attempts to construe the facts to say Officer Harget stopped him, Petitioner testified in his deposition that he drove around the Hometown Inn, his hotel, in search for a parking space close to his room. Unable to do so, Petitioner traveled to the front of the hotel. Petitioner was able to park before Officer Harget arrived. Furthermore, Petitioner admitted that when Officer Harget's patrol car approached, his lights were not flashing. When Officer Harget exited his car and approached the Petitioner's vehicle, the latter rolled down the window without command. At that time, the smell of alcoholic beverage came from within and Officer Harget noticed Petitioner's bloodshot and glassy eyes.

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[2] If he had not been drinking, Petitioner, the holder of a commercial driving license, could have utilized this device to prove so.

[3] While not relevant to the question presented, Petitioner attempts to construe Officer Harget's arrest of him as one event in a continued pattern of harassment. Despite these allegations, Officer Harget does not concede the number of instances Petitioner alleges they had contact.

[4] Although Petitioner alleges that he was not drinking, he admitted that his passenger had.

REASONS FOR DENYING THE WRIT

The decisions reached in this matter do not conflict with a decision of this Court or any circuits. Furthermore, the lower decisions do not implicate a federal question that has not been decided by this Court. Accordingly, Petitioner has not demonstrated any "compelling reasons" for this Court to grant his Petition. *See* Sup. Ct. R. 10.

The crucial facts in this case can be divided into two separate periods separated by the singular event of Petitioner rolling down the window of his parked car. Petitioner asserts that Officer Harget seized him without probable cause when he pulled his patrol car behind him and flashed his lights. The Eleventh Circuit disagreed and ruled that these two factors alone did not constitute a seizure. The court also concluded that once Officer Harget smelled the alcohol emitting from the passenger compartment, he had, at minimum, "a reasonable suspicion that criminal activity 'may be afoot.'" (Pet. App. 15a) (*quoting United States v. Arvizu*, 534 U.S. 266, 273, 122 S. Ct. 744 (2002)). Consequently, the issue is whether those two events, in and of themselves, constitute a seizure within the meaning of *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879 (1968), and its progeny.

I. No Seizure Took Place Until After Petitioner Voluntarily Lowered His Window.

This Court has made it abundantly clear "that mere police questioning does not constitute a seizure." *Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has

occurred." *See Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983) (plurality opinion) (*quoting Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879 (1968). In *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), this Court stated "a person has been seized within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Furthermore, the *Mendenhall* decision provided the following examples to help determine the difference between a consensual police-citizen encounter and a seizure:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

Id. at 554; *see also California v. Hodari D.*, 499 U.S. 621, 628, 111 S. Ct. 1547, 1552, 113 L. Ed. 2d 690 (1991).

Here, Officer Harget did not stop Petitioner. Petitioner freely parked the vehicle he was driving at a time and location of his choosing[5]. Officer Harget did not activate his emergency lights.[6] Rather, he flashed his side window

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[5] Petitioner testified: "Yeah, my room is located around – upstairs toward the back of the building. But as I drove to the back there were cars parked back there, so I couldn't park where I usually parking at. So I park out front." P. 32, L. 23-25 – P. 33, L. 1.

[6] Q.: Did you park your car before Officer Harget pulled up?

A.: Yes.

(Continued on following page)

lights to let Petitioner know he was there. (Pet. App. 13a). There is no evidence that Officer Harget approached with his weapon drawn or any evidence he made a command over his loud speaker. Furthermore, Officer Harget was not loud or commanding.[7] Officer Harget was the only officer present and did not physically touch Petitioner prior to the development of probable cause, or at minimum, an articulable suspicion, that Petitioner was operating the vehicle under the influence of alcohol. None of the factors cited in *Mendenhall, supra,* are present.

The first contact between Petitioner and Officer Harget was when the former rolled down his window. Almost immediately, Officer Harget testified without opposition[8] that he smelled the odor of alcoholic beverage coming from within the passenger compartment of the vehicle. Officer Harget also testified without opposition[9] that Petitioner's eyes were red and bloodshot. At that point, without a word being exchanged, Officer Harget had, at minimum, a reasonable and articulable suspicion that Petitioner was driving under the influence. *See State v. Sledge*, 264 Ga. App. 612, 614 (2003) (*citing Cann-Hanson v. State*, 223 Ga. App. 690, 691 (1996) ("Even in the absence of the field sobriety tests, the officer's observation that [a suspect] had bloodshot, watery eyes and

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Q.: When he pulled up did he have his lights flashing?

A.: No.

(Doc. 28, P. 32, L. 6-10).

[7] Doc. 39, P. 44, L. 20-25.

[8] Although Petitioner claims he had not been drinking, he admitted that his passenger had. Doc. 28, P. 38, L. 6-7.

[9] In affidavit testimony, Petitioner stated that he could not commit on the conditions of his eyes. Doc. 31-12, ¶26.

exuded an odor of alcohol was sufficient to show probable cause to arrest him for driving under the influence."). From that point forward, Officer Harget had the authority to briefly detain Petitioner to investigate further. *See Terry v. Ohio*, 392 U.S. 1 (1968). Once Petitioner refused to submit to any field sobriety tests, Officer Harget then had additional probable cause to arrest Petitioner for the offense of driving under the influence of alcohol. *See Sledge*, 223 Ga. App. at 691.

As this Court stated in *Royer*, 460 U.S. at 497,

> [L]aw enforcement officers did not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some question, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Here, although Officer Harget approached Petitioner, the factors giving him reasonable suspicion were not the result of any questions or interrogation. The Fourth Amendment did not prevent Officer Harget from approaching Petitioner's parked vehicle and observing these possible signs of intoxication. At this point, Officer Harget would have been derelict in his duties not to investigate further.[10]

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[10] Without support, Petitioner states that since he was in the parking lot of a hotel, and "not walking down a public street" or "on a public thoroughfare", Officer Harget's presence "must [have been] in connection with a call or based upon probable cause unless the Officer merely happen[ed] to be there for personal business." (Pet. App. 10). No

(Continued on following page)

II. Subjective Intent Is Irrelevant.

In two separate ways, Petitioner attempts to advance an argument that subjective intent should be considered. First, Petitioner advances the theory that, "[i]f an individual yields to the show of authority, then the police power has been exercised and the interests of the law have been served." (Pet. App. 13). Petitioner further attempts to persuade the Court by stating that once Officer Harget parked his cruiser behind Petitioner's, he had "made a determination to conduct a search and seizure based upon his own judgment." (Pet. App. 9).

Despite Petitioner's arguments, this Court has announced that subjective intent is irrelevant in the Fourth Amendment context. In *Hodari D.*, 499 U.S. at 628, this Court stated, "*Mendenhall* establishes that the test for existence of a 'show of authority' is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person." *See also* Wayne LeFave, *Search and Seizure: A Treatise on the Fourth Amendment* 9.4(a), at 413-14 (4th ed. 2004)[11]; *see also United States v. Waldon*, 2006 F.3d 597 (6th Cir. 2000); *Brower v. County of Inyo*, 489 U.S. 593, 596-97, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989). Consequently, Petitioner's arguments that he believed he had to obey

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case law is provided by Petitioner that suggests a hotel parking lot, open to the public, is not also available to police officers. Literally, such an interpretation would drastically prevent law enforcement personnel from performing their duties.

[11] "In other words, it is not the case that an 'officer can engage in a consensual encounter only with citizens whom he does not suspect of wrongdoing.'"

Officer Harget and/or Officer Harget's' intentions to stop Petitioner are irrelevant when determining whether the seizure actually occurred.

III. The Courts Of Appeals Are In Agreement.

As the lower court pointed out, "police officer[s] do not seize an individual merely by approaching a person in a parked car." (Pet. App. 12a); *see United States v. Baker*, 290 F.3d 1276, 1277 (11th Cir. 2002). Not only has this Court settled this issue, there is no disagreement among the circuits when considering similar factual issues.[12]

In *United States v. Barry*, 394 F.3d 1070 (8th Cir. 2005), the Eighth Circuit Court of Appeals decided a very factually similar case to the case sub judice. In *Barry*, a police officer witnessed a vehicle parked in an alley behind a shopping mall. *Id.* at 1072. It was approaching midnight and most of the surrounding businesses were closed. *Id.* The police officer traveled down the alley and parked approximately fifteen feet in front of the vehicle. *Id.* The officer got out of his cruiser, shined his flashlight on his uniform and approached the car. *Id.* The officer's emergency lights were not activated. *Id.* As he approached, two individuals standing outside the vehicle re-entered it. *Id.* The police officer approached the passenger side window and tapped on it twice without response. *Id.* On the third knock, the passenger lowered his window and the smell of burnt marijuana came from inside. After he smelled the

[12] Petitioner does not cite any disagreement among the circuits. In fact, Petitioner fails to cite any cases with similar circumstances as here.

marijuana, the officer requested back-up and asked the occupants to exit the vehicle. *Id.*

A subsequent search revealed that one of the passengers was a convicted felon in possession of a handgun. *Id.* at 1073. In the following suppression hearing, the magistrate court suppressed the evidence and focused almost exclusively on "whether the police officer's intention to briefly detain the defendant pursuant to a Terry investigatory stop was based on reasonable suspicion of criminal activity." *Id.* The court stated:

> [T]o hold otherwise in this case would be tantamount to a finding that a police officer has the legal authority to make an investigative stop simply because the officer believed the vehicle is in a place it should not be, without an additional basis for believing that criminal activity is afoot.

Id.

The government appealed and the Eighth Circuit reversed. Using the examples cited in *Mendenhall*, 446 U.S. 554, the court ruled that individuals were not seized until the officer ordered them out of the vehicle. *Id.* at 1075. This was after the window was rolled down and the police officer smelled what he believed to be marijuana. *Id.* As for the officer's intentions, the Court stated it "has little or no influence on [the] Fourth Amendment analysis." *Id.* The defendant argued without success that he had been seized because (1) the position of police cruiser would have blocked his car from leaving the alley; (2) by the officer walking directly from the marked patrol car; (3) the police officer shining his flashlights on his uniform to identify himself; and (4) approaching with his hand positioned on his sidearm. *Id.* at 1076. The court rejected these arguments and stated the officer's "conduct [did] not constitute

a seizure, but instead reveal[ed] a uniformed police officer on duty cautiously approaching a vehicle at night, in a business alley area, to question the vehicle's occupants. This approach was, without more, simply an encounter between a police officer and a citizen." *Id.*

In the *United States v. Analia*, 975 F.2d 119, 121 (4th Cir. 1992), the defendant was seen talking on a pay telephone outside a convenience store. The defendant matched the description of a murder suspect. *Id.* After receiving a telephone call from the convenience store manager, two police cars arrived. *Id.* at 122. The officers parked their respective cars on each side of the defendant's vehicle at 45 degree angles. *Id.* The police officer approached the defendant, who was still on the telephone, and stated that he wanted to speak with him. *Id.* After the defendant hung up, the officer requested his license and registration. *Id.* While the officer was checking the license, a third officer arrived. *Id.* The third officer arrived and told the defendant that he matched the description of the murder suspect and requested permission to search the defendant's vehicle. *Id.* This search revealed incriminating evidence. *Id.* The police officers never told the defendant he could leave or refuse their requests. *Id.*

Defendant argued on appeal, that the evidence obtained during this search was illegally obtained because it was neither consensual nor based on the requisite level of objective justification. *Id.* at 123. The Fourth Circuit rejected this argument and held that despite the presence of three officers, no threats or intimidation took place and the encounter was consensual. *Id.* at 125.

Other circuit decisions agree with the lower courts' analysis and decision in this matter. *See United States v.*

Perez-Sosa, 164 F.3d 1082, 1084 (8th Cir. 1998) (holding that where driver did not see a trooper's flashing lights and ignored them, then pulled into a gas station and began fueling, the subsequent encounter between the officer and the motorist was a consensual encounter); *United States v. Castellanos,* 731 F.2d 979, 983-84 (D.C.Cir. 1984) (holding that no seizure occurred when park police officer requested identification from an individual seated in a parked automobile who appeared to be in physical distress); *United States v. Hendricks*, 319 F.3d 993 (7th Cir. 2003).[13]

In his Petition, Petitioner failed to point out any disagreement among the circuits as to whether similar factual scenarios constitute a seizure under the Fourth Amendment. Petitioner's reasoning for the omission of such argument is because circuit case law appears to uniformly support the decision from which he appeals.

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[13] *See* the following state cases: *Betterton v. State*, 527 So.2d 747, 749-50 (1988); *People v. Murray*, 560 N.E.2d 309, 314 (Ill. 1990); *State v. Culbreath*, 387 S.E.2d 255, 257 (S.C. 1990); *Medley v. State*, 630 So.2d 163, 165 (Ala.Crim.App. 1993); *State v. O'Neill*, 62 P.3d 489 (Wash. 2003); *State v. Neyrey*, 383 So.2d 1222, 1224 (La. 1979)

CONCLUSION

Petitioner has not established any compelling reasons for this Court to grant the Petition. Therefore, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

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